

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SOUTHEAST FLOATING DOCKS, INC.,

Plaintiff,

v.

CASE NO: 05CV11039-EFH

AGM MARINE CONSTRUCTORS, INC.,
CHILDS ENGINEERING CORPORATION,
And THE TOWN OF PROVINCETOWN,

Defendants.

_____ /

**PLAINTIFF'S NOTICE OF FILING JUNE 1, 2005 TRANSCRIPT FOR INCLUSION IN
RECORD ON APPEAL**

Plaintiff, Southeast Floating Docks, Inc., gives notice of filing the June 1,
2005 hearing transcript for inclusion in the record on appeal.

CERTIFICATE OF SERVICE

I certify a copy of the foregoing has been electronically filed with the Court and mailed to David Hanrahan, Esquire, Gilman, McLaughlin & Hanrahan, LLP, 101 Merrimac Street, Boston, Massachusetts 02114-9601; Charles Schaub, Esquire, Hinckley, Allen, Snyder, LLP, 28 State Street, Boston, Massachusetts 02109; and, Richard T. Holland, Esquire, Kopelman And Paige, P.C., 31 St. James Avenue, Boston, MA 02116-4102 on August 18, 2005.

/s/ Tina L. Caraballo

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cc: SEFD

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1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS

3 Civil Action No. 05-11039
4 *****
5 SOUTHEAST FLOATING DOCKS, INC.

6 vs.

7 AGM MARINE CONTRACTORS, INC.
8 *****

9 HEARING
10 BEFORE THE HONORABLE EDWARD F. HARRINGTON
11 UNITED STATES DISTRICT JUDGE

12 John Joseph Moakley U.S. Courthouse
13 1 Courthouse Way
14 Boston, Massachusetts 02210
15 Date: June 1, 2005

16 APPEARANCES:

17 Rosemary H. Hayes, Esq., and Leigh A. McLaughlin, Esq., on
18 behalf of Southeast Floating Docks, Inc.

19 Richard T. Holland, Esq., on behalf of the Town of
20 Provincetown, defendant.

21 Eric Eisenberg, Esq., on behalf of AGM Marine Contractors,
22 Inc.
23 John B. Connarton, Esq., on behalf of Childs Engineering.

24 TERI CELESTE GIBSON, COURT REPORTER
25 P.O. BOX 47
DORCHESTER, MASSACHUSETTS 02121
(617) 650-6288

26 Mechanical Stenography; computer aided transcription.

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1 P-R-O-C-E-E-D-I-N-G-S
2 THE CLERK: Civil Action 05-11039, Southeast
3 Floating Docks, Inc. versus AGM Marine Contractors, Inc., et
4 al.

5 THE COURT: I will hear from the plaintiff.

6 MS. HAYES: Rosemary Hayes. I am here from
7 Orlando, Florida, for the plaintiff, Southeast Floating
8 Docks, and we have local counsel.

9 MS. McLAUGHLIN: Leah McLaughlin, Your Honor.

10 MS. HAYES: Judge, I have a -- did you want me to
11 go ahead?

12 THE COURT: Sure.

13 MS. HAYES: I have a handout if I can give it to
14 the Court.

15 THE COURT: Sure.

16 (Document tendered to the Court and defense counsel.)

17 MS. HAYES: Judge, this case is --

18 THE COURT: Let me ask you this. The purpose of
19 the stay is to see if the subpoena should be enforced; is
20 that right? The subpoenas are in force, then the stay is
21 not required.

22 MS. HAYES: Judge, the only problem with that is
23 that we have only a very short time until arbitration is set
24 to begin, which is June 20th. So just a short stay would be
25 necessary, so that we can adequately respond to whatever we

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1 obtain, and records have come in since we filed the suit,
2 but if we can just briefly go through the handout, and I
3 will explain where we are. Tab A is we start without --
4 with the request for records, and Tab A starts with an order
5 from an arbitrator.

6 And the second page of that I highlight and I
7 numbered the pages with a pen in the upper right-hand corner
8 to make it easier, Judge. It's respondent's responsibility
9 to enforce the compliance of the subpoenas, and so we filed
10 this action because the arbitrator has been unable or
11 unwilling to enforce the subpoenas. This dates way back.

12 THE COURT: Let me ask you this question. Why is
13 he unable to enforce his own subpoena?

14 MS. HAYES: He didn't have any contempt power,
15 Judge. So he couldn't find people in contempt or otherwise
16 penalize them when they are non-parties to the arbitration.

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17 So the way that it's typically done, we come to a Federal
18 Court and ask the Court to enforce the subpoenas, and in
19 most of the circuits, that can be done.

20 In the state, in particular Pennsylvania, there is
21 some law that says you can't do that. But in Florida, where
22 I am from and in the First Circuit, generally, if there is a
23 showing that the parties need the records, the courts will
24 enforce the arbitration subpoenas.

25 Page 3 is just to show that this dates back with
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1 the town to a year ago. We were asking under the Public
2 Records Act, for copies of the various -- same records that
3 we are trying to get that have been outstanding today. The
4 next pages are production requests, again seeking the
5 records, and the subpoenas follow beginning at Page 10 to
6 the Town of Provincetown.

7 We look at Page 11 as they are numbered in the
8 upper right-hand corner, there is further back in the
9 handout, I will show to the Court that there are a number of
10 demands that were made on insurance companies and other
11 people for payment on behalf of the Town that we don't have.

12 There is a number of outstanding issues about
13 insurance coverage that we have not received, and the Childs
14 Engineering report, the one specifically mentioned in the
15 court file, and the complaint was received just last week, a
16 27-page fax from the Town attorney after we filed the
17 lawsuit.

18 The most recent subpoena turned back, and by the
19 way, there has not been a response, complete response, to
20 any of the subpoenas that we have severed in -- in many of
21 the subpoenas, there have been no response at all. Turning
22 to the same period, that subpoena issued because of the
23 announcement by GM, they were the expert that had the report
24 that wasn't produced and not the Childs' engineering report.
25 So now we are in search of another expert report.

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1 Tab B --
2 THE COURT: How many subpoenas are there?
3 MS. HAYES: Altogether, there are eight that have
4 been issued.

5 Tab B is just a summary of the responses, and I
6 would just direct the Court's attention to the Town had
7 Childs Engineering's responses. The Town produced a total
8 of 62 pages of records on a fifteen and a half million
9 dollars project. Produced the same 62 pages two times. The
10 consultant produced 69 pages. Now we have additional pages
11 which is the expert report.

12 Mr. Holland represents the Town. His responses
13 follow the chart, Judge, and basically he is saying --
14 continues to say today, I believe, that the information
15 after December 1, 2003, constitute work product, and I am
16 reading from Page 3 of Section B. work product and inner
17 agency memorandum or letters relating to the policy
18 positions being developed by the Town.

19 Page 4, he again states that the materials are
20 work product and attorney-client privilege and exempt from
21 the Public Records Law, and I recognize we are not here on a
22 Public Records lawsuit, but we are here to enforce the
23 subpoena.

24 Finally, Judge, I would ask you in this section to
25 turn back to Page 9, which is a letter from the attorney for
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1 Childs Engineering. Childs Engineering has been severed,
2 but I don't think that they are represented here today.

3 MR. CONNARTON: Excuse me. I am John Connarton
4 with Callahan of Boston. My client was served after Your
5 Honor's order, with the short order of notice, is why I am
6 here this afternoon. It's my understanding apparently from
7 conversation this afternoon, also from what I just heard
8 from counsel, that in reality, only the document that was at
9 issue with my client was a report, which I understand now
10 has been produced and any potent privilege, if there was
11 any, was waived. So if that is all counsel is looking for
12 my client for, I would request Your Honor to allow me to
13 leave and turn my client's clock off.

14 MS. HAYES: I think there is additional materials
15 that your client has not produced. If we go through this,
16 there are other things.

17 MR. CONNARTON: Only the thing sought, Your Honor.

18 THE COURT: Let he hear argument.

19 MR. CONNARTON: Thank you, Your Honor.

20 MS. HAYES: Page 9 states a letter from Craig Sams
21 (ph.) on behalf of Childs Engineer's counsel for the Town of

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22 Provincetown objected to release any documents that were
 23 prepared for anticipated litigation. Counsel for
 24 Provincetown in the process of writing to you to provide
 25 further clarification. That never happened. Then page 10

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1 is from FS&T, the Town's engineer for the project, and once
 2 again, states that documents number 105 to 110, 10 and 121
 3 and 123 and 128 have been withheld at the Town's counsel.
 4 Privilege log from -- FS&T are the only ones that provided a
 5 privilege log, show that the documents are being withheld
 6 are clearly not within the attorney-client privilege or the
 7 work product privilege as far as the work product privilege
 8 goes, and I have case law with the Court, there has to be
 9 anticipation of litigation.

10 In this case, AGM and the Town have settled their
 11 disagreements. There is no anticipated litigation that
 12 would allow the work product privilege. The Town asserts
 13 the work product privilege in regard to multiple engineering
 14 firms, assume we will next get another claim of work product
 15 privilege as to the latest engineering firm, and this can --
 16 stands for the proposition that you can't have a rolling
 17 joint defense agreement where you are entitled to search
 18 work product defenses for third parties willie-nillie,
 19 because it's against public policy. We have no other way of
 20 obtaining the information. The Town won't give it to us.
 21 The engineers won't give it to us, and the attorney-client
 22 privilege is not met because these are privileges, these are
 23 communications to third parties. So the element of being
 24 between an attorney and a client would not be met.

25 THE COURT: You are the defendant in the

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1 arbitration; is that correct?

2 MS. HAYES: Yes, sir.

3 THE COURT: So if -- what's the position of the
 4 plaintiffs in the arbitration?

5 MS. HAYES: Well, I think the attorney is here
 6 representing the plaintiff -- the plaintiffs of the
 7 arbitration, but they have basically said they don't have
 8 anything else to give us, nothing else exists, and they have
 9 tossed --

10 THE COURT: I am concerned with the consequence.
 11 If the Court were to stay this proceeding, the arbitration
 12 proceeding, pending a resolution of this matter, that
 13 affects adversely, I would think, the plaintiff in that case
 14 and whatnot.

15 MS. HAYES: That is probably true. They would
 16 argue that but the work that --

17 THE COURT: I am not saying they are arguing it.
 18 I am trying to find out if that is true. Is that true?

19 MS. HAYES: I don't think a short postponement
 20 would --

21 THE COURT: That's not my point. My point is if I
 22 were to stay this matter, whether you request it or not,
 23 without delay, that is not going to affect you, is it? It's
 24 going to be helpful to you.

25 MS. HAYES: Yes, sir, because we can complete the

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1 discovery, hopefully.

2 THE COURT: More than that. If the case is never
 3 resolved, you can never have anything, a judgment against
 4 you.

5 MS. HAYES: Yes, Judge.

6 THE COURT: So it's to the advantage, I would
 7 think, of the plaintiff in the arbitration proceeding to
 8 move this case along.

9 MS. HAYES: Yes, sir.

10 THE COURT: I would think so.

11 MS. HAYES: Yes, sir. And we would only seek a
 12 short stay. We want to get this over with, also. But we
 13 don't want to go in where we feel that the engineering
 14 firms, and to some extent we have felt that the plaintiff in
 15 the arbitration and the Town have engaged in a game of hide
 16 the pea under the shell, and this expert report existed and
 17 it didn't exist, and then a year after, we finally got a
 18 copy of it, and now there is another engineering firm. We
 19 would request a 30- to 60-day extension of time to procure
 20 the records.

21 THE COURT: Let me ask the plaintiff in the
 22 arbitration proceeding.

23 MR. EISENBERG: Good afternoon, Your Honor.

24 You are right on point, Your Honor. I understand
 25 where my sister is coming from, but it's not appropriate.

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1 Under Hickman v. Taylor, if we were there, and I say we are
2 not because of the arbitration aspect of this one. Hickman
3 v. Taylor, she would be entitled to that. She wouldn't get
4 anywhere else. The fact that the Town is not a party to the
5 arbitration, hired experts, and they came to some
6 conclusions, is not relevant to her case.

7 If she were missing climatological data,
8 videotapes of the waves, measurements of docks, anything
9 that couldn't be obtained otherwise, she might have an
10 argument, leaving aside arbitration issues, but she hasn't
11 said that.

12 What she is doing, Your Honor, and I know it's
13 kind of ironic. He is fishing. We talk about marina. But
14 she is looking at their expert work product, non-testifying
15 experts, all right. Or if they are to testify, they would
16 have to come to the arbitration and have to bring their
17 reports and their files. The law is pretty clear on this,
18 Your Honor. Your Honor is here in this particular instance,
19 to enforce or refuse to enforce an arbitration ruling by the
20 arbitrator. There is case law, and it's again not cited.

21 THE COURT: What is the --
22 MR. EISENBERG: The arbitrator ruled twice now
23 that my sister is not entitled to an extension of time. In
24 one document, that's the June 9th order. He said with
25 regard to the trial report, that single report, he

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1 acknowledges, "We don't have it," and said that if she
2 wanted to pursue the Town, she could.
3 All right. The Town has reasons of its own. I am
4 not privy to them, given over the trial's report. Now I
5 hear --

6 THE COURT: I will get to that.
7 MR. EISENBERG: Now I hear there are other reports
8 and other experts, and this is all a delay. The fact is I
9 haven't heard anyone say there is anything unique in the
10 possession of the Town in the way of firsthand knowledge or
11 evidence that they don't have.

12 Beyond that they have got --
13 THE COURT: You are saying on the thing -- all
14 these subpoenas are seeking to Childs' report?
15 MR. EISENBERG: That is what it started with. Now
16 I am hearing something. Now I hear there is another
17 engineering firm, Simpson, Gumpert & Heger, and I know they
18 are an engineering firm. I don't know what they have done
19 for the Town, but it doesn't matter. My sister is not
20 entitled to non-testifying expert materials obtained by the
21 Town.

22 THE COURT: Let me ask the Town.
23 MR. HOLLAND: Yes, Your Honor.
24 THE COURT: Do you have both of these reports,
25 so-called Childs reports and the Heger report?

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1 MR. HOLLAND: Yes, sir, Your Honor, the Childs'
2 report has been provided back on May 23rd as well as only
3 the document prepared by Simpson Gumpert and Heger, that
4 that was faxed on May 23rd to counsel for Southeast. So
5 they have these two reports. Now what I would like to do,
6 Your Honor, if I can rewind a little bit.

7 THE COURT: Let me -- is that true? Have you got
8 those two reports?

9 MS. HAYES: I have the Childs report, and I have
10 seven pages of a Powerpoint presentation with nobody's name
11 on it at all. But the point, Judge, is first of all the
12 arbiter never denied a stay in this case. Arbitrator
13 waiting --

14 THE COURT: That is not my question. My question
15 is it seems at least according to the defendants in this
16 action, that there are two reports that you seek. It's been
17 represented that the Town has turned over those two reports.
18 Is there anything else that you wish?

19 MS. HAYES: Yes, sir. There are other --

20 THE COURT: What are they?

21 MS. HAYES: The insurance demands for insurance
22 coverage and responses to the demands for its insurance
23 coverage because --

24 THE COURT: And who -- and what subpoena was that
25 directed to?

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1 MS. HAYES: That was into the Town. We asked for
2 all the demands for insurance, all demands that were made on
3 anybody. There is no evidence of the Town that we have seen
4 making a demand on AGM, and yet they enter into a settlement
5 agreement with AGM. AGM is now trying to turn around --

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6 THE COURT: She says there is more material than
7 she subpoenaed in addition to that which you represent to me
8 has been turned over.

9 What is your response?

10 MR. HOLLAND: In fact, there are additional
11 documents. If I can rewind for a minute, Your Honor.

12 THE COURT: Sure.

13 MR. HOLLAND: Did Your Honor have an opportunity
14 to see this? Of course I apologize. I submitted it this
15 morning.

16 THE COURT: I understand.

17 MR. HOLLAND: May I approach?

18 THE COURT: Sure.

19 MR. HOLLAND: Of course it's a bit lengthy.

20 Your Honor, the plaintiff has had ample
21 opportunity to investigate the failures of the floating dock
22 system. That is the subject of this whole dispute as the
23 memorandum that I just handed sets forth. They were invited
24 to view the components of the failed system in March of
25 2004.

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1 As a matter of fact, a representative of the
2 plaintiff visited Town Hall just for that reason. We met
3 with them, and we provided to Southeast a copy of the
4 videotape that showed that was created during the course of
5 this storm. They were also provided with a preliminary
6 analysis in form of charts showing wind speed and wave
7 heights as calculated by the Town.

8 In addition, and I also want to reference some of
9 these issues, Your Honor, because I don't want it to appear
10 that the Town has been uncooperative here. Counsel for
11 Southeast reference, a June 14, 2004, letter saying that it
12 requested public records. The letter was submitted to me,
13 Your Honor, and I sent to counsel, that this is misdirected,
14 it should be directed to the custodian of records, but
15 nonetheless, I will give you copies of correspondence among
16 counsel dealing with this issue. To my knowledge, counsel
17 has never responded to my letter or submitted a public
18 records request to the Town custodian.

19 Now, granted, a subpoena was issued recently. I
20 responded to that subpoena with a letter within six or seven
21 business days of receipt of that subpoena, and invited
22 counsel to come to inspect the documents at Town Hall.
23 Granted, I did object to the production of certain
24 documents, and ultimately, have evaluated there may not be
25 further litigation involving the Town disclosed in these two

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1 reports at issue. I never received the call to make
2 arrangement for the inspection of town documents. I would
3 be happy to provide the documents, so that counsel can
4 inspect them. The only documents, Your Honor, that I
5 continue to object to the production of, are those documents
6 that memorialized communications, which I believe are
7 protected by the attorney-client privilege. But it's my
8 understanding that the only documents at least up to this
9 hearing, are the documents that were sought, were these
10 expert reports. They are sought on the basis that they are
11 under hardship because absent these reports, they are unable
12 to discern the features of the Floating document system.

13 Well, as the record will show, as my memorandum
14 will show, that's just not true. They had ample opportunity
15 to investigate the causes of the failure of the system.
16 They now have the only two documents that were prepared by
17 two consultants retained by the Town, and the Town, I
18 believe, Your Honor, still have an argument to continue to
19 withhold these under an exception.

20 THE COURT: You said you turned them over.

21 MR. HOLLAND: That's true.

22 THE COURT: The complete documentation with regard
23 to the reports.

24 MR. HOLLAND: That is absolutely true, Your Honor.

25 THE COURT: The one that consists of seven pages.

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1 MR. HOLLAND: Yes. One consistent while is --
2 Childs prepared a written report. She has that. The other
3 is Simpson, Gumpert & Heger. The only document that they
4 prepared, Your Honor, was a Powerpoint presentation type
5 document with bullet headings, and it contains their
6 analysis of the wind speeds and wave heights. That is all
7 they prepared, and that too was given to counsel for
8 Southeast.

9 THE COURT: So what exactly are you looking for?

10 MS. HAYES: Judge, if I can beg the Court's

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11 indulgence.
12 In subsection --
13 THE COURT: Here is my question: What are you
14 looking for.
15 MS. HAYES: I am looking for the materials in this
16 privilege log that were not produced. That is in the stuff
17 I have given you, Judge, I am looking for under Tab C, we --
18 the insurance that is discussed. Behind tab --
19 THE COURT: When did that subpoena go out?
20 MS. HAYES: Yes. All of these things are listed
21 on the same subpoena, Your Honor, C119 minutes, meeting
22 where the insurance is discussed. I put this in here
23 because I knew they were going to come in and feign
24 ignorance, but they discussed the \$200,000 deductible on
25 their insurance.

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1 After that, if you turn back, Page 4 and 5 under
2 that section, Judge, those are from another case that is
3 pending before this Court. It's a case by AGM's commercial
4 general liability insurance company for declaratory judgment
5 in which AM has filled a motion for summary judgement, that
6 they have coverage for the same damages that they are trying
7 to come after my client for. That letter has a page
8 missing, and the page that is missing is Page 3 of 5, Judge,
9 and if we go back to Page 6 as numbered by me at the upper
10 right hand corner, the Court sees that it says there,
11 damages rising out of contractual agreement between the Town
12 and third parties would not constitute an occurrence under
13 the policy.

14 Now, missing is the page before that from the
15 court file. That is where we got this. Nobody produced
16 this for us, even though it's insurance information, and we
17 subpoenaed it. We obtained from the court file that another
18 case is pending in front of this court.

19 Now, the page before that might explain to us
20 whether third party contracts are the fault of the loss that
21 AGM is trying to pass on to my client. But they know that
22 the wave heights exceeded the designed limits because the
23 report that took us a year to get says that, but who knows
24 what else they know out there, because thus far, in all due
25 respect they have been less than forthcoming with

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1 information.
2 THE COURT: How about this insurance, what is your
3 response to that?

4 MR. HOLLAND: Your Honor --
5 THE COURT: The insurance material that she just
6 referenced?

7 MR. HOLLAND: As I said, Your Honor, and we have
8 spoken, I would be happy to provide her any documents that
9 do not constitute attorney-client privilege. The insurance
10 information, I would be happy to find out more information
11 about that. As I said, we invited her in response to the
12 subpoena on -- letter that you see attached to the
13 memorandum, Your Honor, on -- actually, the day escapes me,
14 but before the filing of the complaint, I invited them to
15 come and inspect the Duntos (ph.) documents. She is arguing
16 a point, Your Honor, that isn't a dispute.

17 THE COURT: He says he is willing to allow you to
18 inspect that material.

19 MS. HAYES: I would be glad if that judgment -- so
20 far we asked for specific items, and I wrote we don't have
21 to purge, or we are not going to produce, including
22 everything on the privilege log prepared by those documents,
23 memos, and e-mail from this attorney to FS&T that talk about
24 steel floats that we said -- what they said should have been
25 used to begin with on the project.

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1 The Town made a decision to go with a system that
2 was not of adequate strength to withstand conditions in
3 Provincetown, plain and simple, and they took out a
4 breakwater. Now, they don't want to expose the underlining
5 contents of comments and discussions about who was really at
6 issue here. Instead, they made a deal with AGM and agreed
7 to support AGM and try to come -- the dock manufacturer.
8 These were shipped freight on board to the job site,
9 offloaded, and installed by AGM. But they are looking for
10 half a million dollars at last count from my client based on
11 issues that they have nothing to do with us. They were
12 under design. The Town made a poor decision being a
13 breakwater, and all of these things are reflected in the
14 documentation, aren't really work product or attorney-client
15 privilege, Judge, they just don't want us to find out about

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16 them. That is the only reason.
 17 MR. HOLLAND: Your Honor, I vehemently object to
 18 these statements.
 19 THE COURT: Let me hear what you have to say.
 20 MR. HOLLAND: She can come out and inspect
 21 whatever documents she would like to see. The only
 22 documents that I wish to -- to withhold are any documents
 23 that I believe are protected by the attorney-client
 24 privilege.
 25 Counsel referenced FS&T, that is an acronym, Fay,
 0020 Spofford & Thorndike. There are several documents
 2 encompassed between the attorney-client privilege. There
 3 are communications between me and the project engineer. The
 4 project engineer being third party closely identified with
 5 the Town. The purpose for those communications, solely for
 6 me to request information, so that I can give informed and
 7 adequate legal advice to the Town. As a matter of fact, I
 8 knew there might be an issue even after SFT named a
 9 defendant. I brought those documents in here. I would be
 10 very happy to hand them to Your Honor for in camera
 11 inspection. The issues that they are concerned with are
 12 solely technical issues.
 13 THE COURT: Let me ask you this with respect to
 14 the material that you say you have no problem with.
 15 MR. HOLLAND: Yes.
 16 THE COURT: Why didn't you turn those over?
 17 MR. HOLLAND: I offered to make information
 18 available for inspection. They never responded to that.
 19 They just filed a complaint.
 20 THE COURT: As of now?
 21 MR. HOLLAND: Yes.
 22 THE COURT: Would you turn those where you have no
 23 objection to?
 24 MR. HOLLAND: Yes. I would be happy to, Your
 25 Honor. As a matter of fact, today before the hearing, I
 0021 provided a copy of documents. It's a binder and it -- if,
 2 Counsel, you would be so kind to hold up to the Court.
 3 Within that binder are a number of project documents. That
 4 binder was what the Town provided to its consultant to
 5 review for documentation, so I did provide some documents.
 6 If they have a specific question on -- I know she's looking
 7 for insurance information. I would be happy to find out
 8 about that. I will make an inquiry today.
 9 MR. EISENBERG: Your Honor, if I may, I have been
 10 sitting here quietly. I also object to counsel's comment.
 11 The documents were provided. It will be an issue in the
 12 arbitration. They are missing -- there is a detail in terms
 13 of attachment of the main documents to the finger piers that
 14 wasn't shown on the drawings, that is an issue for the
 15 arbitrator.
 16 My only dog in this particular hunt is whatever
 17 counsel wants to do by way of discovery, the third party,
 18 should have been done long ago. The arbitrator has twice
 19 now extended the deadline for counsel to make an expert
 20 report. They didn't make an expert report we have today for
 21 arbitration.
 22 If counsel wanted to stay after that arbitration
 23 or extension of time, the proper place to go is the
 24 arbitrator. And, Your Honor, knows the case law as well as
 25 I do, that the Court really is not supposed to inject
 0022 itself, and I can cite cases if you want into the workings
 2 of arbitration. That is for the arbitrator. As to the
 3 discovery of a third party, I know it's split in the
 4 circuit. Some circuits say third party subpoenas can be
 5 enforced by this court. Other circuits say they can't,
 6 prior to the actual arbitration.
 7 As far as I know, the First Circuit hasn't ruled
 8 on this point, but it's all irrelevant. She has all of the
 9 documents, or she has a willingness to produce all the
 10 documents that aren't privileged, and I didn't want my
 11 arbitration delayed on account of this back and forth with
 12 parties, other than the other party to the arbitration.
 13 Thank you, Your Honor.
 14 MS. HAYES: We did produce a report. I mean, the
 15 inaccuracies here are outrageous, but we did produce a
 16 report --
 17 MR. EISENBERG: I said you did eventually but --
 18 MS. HAYES: -- in this.
 19 THE COURT: It's okay.
 20 MS. HAYES: I have given to the Court, if we turn

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 21 to Tab B, and it's Page Number 14, 13 at the top. At the
 22 upper right, Judge. E-mail from Provincetown, McMillin,
 23 pier damage. This is the Fay, Spofford & Thorndike
 24 privilege log.

25 Now, how can the Fay, Spofford & Thorndike

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1 privilege log include communication, that that is
 2 attorney-client privilege with the Town, and then we go on.
 3 This is immediately after the storm. The storm was
 4 December 7th and 3rd of '03, so immediately after the storm,
 5 these folks are e-mailing back and forth about the pier,
 6 dock, and the site visit December 8th. These are critical,
 7 important information to the dock manufacturer. The next
 8 page, they have a summary of a meeting and telephone calls
 9 and discussion about steel floats. Completely different.
 10 They are concrete floating docks, and what this probably
 11 says is what we said from the beginning, you should have
 12 used steel floats. That is important to the defense of my
 13 case. Is that attorney-client privilege, I don't think so.

14 THE COURT: Let me ask you this, why didn't the
 15 other -- what is the position of the arbitrator? What does
 16 he do with respect to the -- his own subpoenas.

17 MS. HAYES: He has said that he -- that the Court
 18 has to speak, has to enforce them, that we have to go to
 19 court, he said, and said it during teleconferences that we
 20 have to enforce them, that is why we filed this action. One
 21 item -- 110 memos and letters and faxes provided. Those
 22 were all given to Mr. Holland by FS&T, Fay, Spofford &
 23 Thorndike, the engineer. How is that attorney-client
 24 privilege? They are not.

25 MR. EISENBERG: As far as I know, and I will ask

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1 counsel to correct me if I am -- I don't think the issue,
 2 the subpoena to Fay, Spofford & Thorndike, hasn't been
 3 before the arbitrator. What was before the arbitrator, the
 4 Childs report, and that issue has involved whether the
 5 arbitrator would or would not agree that this is relevant or
 6 irrelevant to the arbitration to my knowledge has not been
 7 communicated or presented to the arbitrator. Sorry to
 8 interrupt.

9 MS. HAYES: Absolutely every one of the subpoenas
 10 has been discussed with the arbitrator. That is not -- that
 11 is totally untrue. What he said, that we have to enforce
 12 them. That's the only way to do it, is for us to enforce
 13 it. He has no mechanism to enforce them. The only thing he
 14 can do is send out another order, and say, "I order." He
 15 doesn't have a right to fine someone. He is an arbitrator.

16 The documents in the privilege log --

17 THE COURT: It seems to me whether he can hold
 18 someone in contempt or not, has these issues been brought
 19 before him? Have they been argued?

20 MS. HAYES: Yes, sir, they have.

21 THE COURT: What was his action?

22 MS. HAYES: His action was to send out an order
 23 that says it's up to the plaintiff to enforce them. And
 24 pursuant to the Federal Arbitration Act, Section 7, the
 25 Federal District Court has jurisdiction to enforce

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1 arbitration subpoenas. The problem here is that FS&T's only
 2 business basis for withholding the privilege documents, they
 3 did not assert that, their attorney-client privilege. They
 4 say, "The Town's attorney has told us to withhold these
 5 documents, so we are withholding them." That's on Page 9 of
 6 subsection of the Section B. They tell us, "We are holding
 7 these because counsel for the Town of Provincetown has
 8 objected to their release." They can't be attorney-client,
 9 and I ask the court to order the Town to release the
 10 records.

11 MR. EISENBERG: Your Honor, I haven't seen an
 12 order from the arbitrator verifying or ruling relevant these
 13 requests. I don't think this particular issue on these
 14 documents has been before the arbitrator.

15 MR. HOLLAND: I would like to address Your Honor.
 16 First, with respect to Section 7 of the Federal Arbitration
 17 Act, that section doesn't permit the arbitrator to issue
 18 prehearing subpoenas for the production of documents from
 19 third parties. It does not. It allows the issuance of
 20 subpoenas for witnesses to attend and bring documents with
 21 them to the hearing. That said, I would like to address the
 22 issue of the log.

23 The log was subjected from Fay, Spofford &
 24 Thorndike, who is not a defendant in this action and that
 25 log did have certain documents that I had identified without

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1 having first seen them to withhold, I wanted to look at them
 2 to see if I thought there were any communications that I
 3 would have had with this third party for the purposes of
 4 giving legal advice. Having done that, there are seven
 5 items that counsel has just gone through that I have
 6 determined aren't protected, and they can have those
 7 documents.

8 And as a matter of fact, I have been in
 9 conversation with Caraballo of your office, and I am going
 10 to identify the ones I would withhold, but I haven't had a
 11 returned call from her or you.

12 Let me finish, please.

13 I have here, Your Honor, there are about six or
 14 seven pages, some of the ones that counsel went through and
 15 questioned, How are these privilege? They are not contained
 16 in the folder.

17 I am happy to do whatever I can do to resolve the
 18 dispute. If Your Honor would like to take the documents in
 19 camera, you can see they are communications that are merely
 20 project engineer, from me, to obtain the relevant facts,
 21 legal advice to the Town. There is nothing in here that
 22 bears any relation to the technical issues that counsel is
 23 concerned about. She references a document about steel
 24 floats. That is not in this folder. They can have access
 25 to those documents. I would be willing to submit this.

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1 THE COURT: Your representation is that at least
 2 what, that which you claim is attorney-client privilege, you
 3 are committing yourself to allowing the plaintiff in this
 4 action the opportunity to inspect the other material?

5 MR. HOLLAND: That's correct, Your Honor. That's
 6 absolutely correct.

7 MS. HAYES: How can there be client-attorney
 8 privilege?

9 THE COURT: I am not even talking about that. You
 10 just got, I think, at least half or three quarters of what
 11 you are looking for.

12 MS. HAYES: Great. Thank you, Judge.

13 THE COURT: Are you ready to take that?

14 MS. HAYES: Yes. I would like all of it though.

15 THE COURT: I understand you do. But, you know,
 16 when you get three quarters, at least be somewhat happy
 17 about it. Sometimes you can go a thousand percent. I am
 18 not -- I made no ruling with respect to attorney-client, but
 19 the man is -- just said he is going to allow you the
 20 opportunity to inspect most of the material.

21 MS. HAYES: I appreciate that.

22 THE COURT: Are you going to take advantage of
 23 that?

24 MS. HAYES: Yes, I am.

25 THE COURT: Anything else you want to say?

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1 MS. HAYES: I just want to read one more paragraph
 2 one time from the arbitrator's order.

3 If the claimant has in its possession and control
 4 a copy of a report of the Town, consulting, engineering,
 5 Childs Engineer, it shall immediately produce respondent,
 6 otherwise, it is respondent's responsibility to enforce
 7 compliance with its subpoenas, and that is the position the
 8 arbitrator is taking.

9 MR. CONNARTON: You want to do this, go do it. I
 10 am not going to do it. I can't do it, but you can, so
 11 that's the reason we are here.

12 THE COURT: But is it true or isn't it, I am not
 13 sure, that this dispute at least originated, was sparked by
 14 your desire to obtain two reports, which reports have now
 15 already been provided you; is that correct?

16 MS. HAYES: I understand from what he says, yes,
 17 they have been provided to me, yes. That's part of it, but
 18 the other issue, that is just as important.

19 THE COURT: Is the insurance?

20 MS. HAYES: Yes.

21 THE COURT: He indicated that except for certain
 22 conversations he might have had, that the insurance material
 23 is going to be made available to you.

24 MS. HAYES: Yes, sir.

25 THE COURT: Is that true?

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1 MR. HOLLAND: Yes, Your Honor. As I sit here, I
 2 don't know what insurance information is available or claims
 3 have been made, but whatever exists, that's not
 4 conversations of mine, I will provide, yes, Your Honor.

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5 THE COURT: So what remains?
6 MS. HAYES: The information in the privileged log
7 that he is continuing to withhold.
8 THE COURT: What does it relate to?
9 MS. HAYES: Well, I am not sure which documents he
10 is giving up on and which he is continuing to assert.
11 MR. HOLLAND: May I approach, Your Honor? I would
12 be happy to give them to Your Honor.
13 THE COURT: Is that the privileged log?
14 MR. HOLLAND: These are the documents, the several
15 pages of documents.
16 THE COURT: Let me see it.
17 (Document tendered.)
18 MS. HAYES: The privilege log is in the material
19 that I gave to the Court.
20 (Off the record.)
21 MS. HAYES: He identified 120, 121, and 123 to 128
22 as being in that folder.
23 MR. HOLLAND: Yes.
24 MS. HAYES: And is it my understanding the rest of
25 those, you have no objection to giving us now?
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1 MR. HOLLAND: That's right.
2 MS. HAYES: All the ones that are in here.
3 MR. HOLLAND: The only one withheld were the
4 highlighted ones, I believe.
5 MS. HAYES: I want to make sure we are on the same
6 page.
7 MR. HOLLAND: The only one being withheld to look
8 at were the highlighted versions, and I looked at these, and
9 I just replaced these. These are the only ones I have
10 objections. Everything else, you can have. And all of the
11 items in that index were documents as I understood were to
12 be provided, except for the highlighted portions.
13 MS. HAYES: That's correct.
14 (Documents tendered back to counsel by the Court.)
15 THE COURT: All right. Is there anything else to
16 be said prior to my taking this matter under advisement?
17 MR. CONNARTON: On behalf of myself and my client,
18 when we started this, I think Your Honor now is very clear
19 that the only issue with respect to my client who was made a
20 defendant in this lawsuit and served with, Your Honor, short
21 order of notice was the alleged Childs' report, which is my
22 understanding has been turned over, and has now for about a
23 week, that's the only thing that was mentioned in the
24 complaint from which your short order was issued that has
25 been done, and what I would like to do, just somehow get my
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1 client out of this and not have to spend any more money, to
2 make him happy, because it may not necessarily make me
3 happy.
4 THE COURT: You want for --
5 MS. HAYES: I attach the subpoena. If they want
6 to send me a letter saying, "Now that you have the report
7 and other records that we produced," they gave me 68 pages,
8 and that is all we have in response to our subpoena, I would
9 gladly dismiss him. I would like something affirmative
10 stating that they don't have anything else responsive to the
11 subpoena.
12 MR. CONNARTON: Your Honor, please, my client did
13 provide counsel with a response and provided counsel with
14 documentation. Other than what was asked for by my client
15 to withhold, under the attorney-client privilege, which was
16 in fact the Childs report.
17 And in fact, if Your Honor just simply takes a
18 look at the complaint that started this proceeding, that is
19 all they ever mentioned. It's a little bit like I hear
20 counsel saying today all of a sudden this afternoon we are
21 getting here, it may be this and it may be that. It's the
22 Childs report that's been produced, that is the only thing
23 that was even mentioned in the complaint, and we did provide
24 a response to the original subpoena with documentation at
25 the time they were served.
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1 THE COURT: All right. I will take the matter
2 under advisement. I will review the material submitted by
3 the plaintiff and the Town.
4 Thank you.
5 COUNSEL: Thank you, Judge.
6 THE CLERK: All rise. Court is adjourned.)
7 *****
8 C-E-R-T-I-F-I-C-A-T-E
9

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10 I, TERI CELESTE GIBSON, CSR, RPR, CRR, do hereby certify
that the foregoing pages 1 through 32, which are a true and
11 accurate transcription of my stenographic notes taken in the
above-entitled hearing, prepared to the best of my
12 knowledge, skill, and ability at the time and place
aforementioned.
13
14

TERI CELESTE GIBSON, CSR, RPR DATE: 8/13/05

15
16 This certificate only applies to transcripts produced,
copied, and signed by Teri Celeste Gibson, Court Reporter.
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